IN THE SUPREME COURT OF IOWA

STATE OF IOWA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	S.CT. NO. 16-0900
	)	
JAMES MICHAEL COLEMAN,	)	
	)	
Defendant-Appellant.	)	

APPEAL FROM THE IOWA DISTRICT COURT
FOR BLACK HAWK COUNTY
HONORABLE STEPHEN C. CLARKE, JUDGE (JURY TRIAL, PRIOR OFFENSE STIPULATIONS, & SENTENCING)

APPELLANT'S BRIEF AND ARGUMENT AND REQUEST FOR ORAL ARGUMENT

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CERTIFICATE OF SERVICE

On June 20, 2017, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to James Coleman, No. 6672512, Mt. Pleasant Correctional Facility, 1200 East Washington, Mt. Pleasant, IA 52641.

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State v. Tobin, 333 N.W.2d 842, 844 (Iowa 1983)

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State v. Van Hoff, 415 N.W.2d 647, 648 (Iowa 1987)

State v. Dudley, 766 N.W.2d 606, 626 (Iowa 2009)

State v. Cooley, 587 N.W.2d 752, 754 (Iowa 1999)

Iowa Code § 910.2(1) (2015)

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Goodrich v. State, 608 N.W.2d 774, 776 (Iowa 2000)

ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court because the issues raised in Divisions I-III involve substantial questions of first impression in Iowa. Iowa R. App. P. 6.903(2)(d) and 6.1101(2)(c). Specifically, this Court's guidance is needed in interpreting the sex offender registry obligations imposed by Iowa Code section 692A.105, and in evaluating whether that statute is unconstitutionally vague.

Additionally, Division V presents substantial questions of enunciating or changing legal principals in Iowa. Iowa R. App. P. 6.1101(2)(c), (e). Specifically, this case raises the question of whether the district court is required to comply with all of the plea-taking requirements of Rule 2.8(2)(b)(2) when accepting a defendant's stipulation to prior offenses for purposes of enhancement under Iowa Rule of Criminal Procedure 2.19(9).

STATEMENT OF THE CASE

Nature of the Case: This is an appeal by Defendant-Appellant James Michael Coleman from his conviction, sentence, and judgment for: Failure to Comply with the Sex Offender Registry, Second Offense, being a Habitual Offender, a Class D Felony in violation of Iowa Code sections 692A.104, 692A.105, 692A.111, 902.8, and 902.9 (2015).

Course of Proceedings: On October 5, 2015, the State charged Coleman with Failure to Comply with the Sex Offender Registry, in violation of Iowa Code sections 692A.104 and 692A.105 (2015). The State alleged the registry violation was a Second Offense, resulting in enhancement to a Class D Felony under Iowa Code section 692A.111. (10/5/15 TI)(App.5-6). The State subsequently amended the charge to also add a Habitual Offender enhancement under Iowa Code sections 902.8 and 902.9 (2015). (2/22/16 Amended TI; 2/22/16 Order Amending; 3/7/16 Amended TI; 3/7/16 Order Amending)(App.9-16).

It was determined that trial on the underlying registry violation would be held first, with proceedings on the Second Offense and Habitual Offender enhancements to be scheduled at a later date. (Trial p.112 L.13-20). A jury trial on the underlying registry violation commenced on March 8, 2016. (Trial p.1 L.1-25). On March 10, 2016, the jury returned a verdict finding Coleman guilty of Failure to Comply with the Sex Offender Registry. (Trial p.315 L.1-25, p.366 L.2-13); (Verdict Form)(App.17-18).

Initially, Coleman waived his right to a jury trial on the sentencing enhancements, agreeing to submit to a bench trial thereon. (Trial p.368 L.19-p.373 L.10). Subsequently, on March 21, 2016, Coleman stipulated to both the Second Offense enhancement, and the Habitual Offender enhancement. (3/21/16 Tr. p.1 L.1-25, p.2 L.11-24). The stipulation was pursuant to a plea agreement providing that his sentence in the instant case would be run concurrent with the sentence imposed on a separately pending probation violation matter (AGCR202305). (3/21/16 Tr. p.5 L.7-p.6 L.4).

The court accepted Coleman's stipulation to the enhancement, finding that it was voluntarily entered and was supported by a factual basis. (3/21/16 Tr. p.10 L.25-p.11 L.5).

A sentencing hearing was held on April 29, 2016. At that time, the court imposed judgment against Coleman for Second Offense Failure to Comply with the Sex Offender Registry, a Class D Felony, committed as an Habitual Offender, all in violation of Iowa Code sections 692A.104, 692A.105, 692A.111, 902.8, and 902.9 (2015). The Court imposed but suspended the indeterminate term of incarceration not to exceed 15 years (with a mandatory minimum of three years), and placed Coleman on probation. As a special condition of probation, the court specified that Coleman must reside at a residential treatment facility for a period of one year or until maximum benefits have been achieved.[1] The court also ordered Coleman to pay court costs, but found him not

[1] As a result of the registry violation herein, a probation violation was found in separately pending AGCR202305. The court ordered that the probation sentence in the instant case be served concurrently with the continued probation sentence in that other matter (AGCR202305). (Sent. Tr. p.20 L.15-19, p.22 L.10-23).

reasonably able to reimburse the state for court appointed attorney fees. (Sent. Tr. p.17 L.23-p.19 L.5, p.20 L.1-p.21 L.18); (4/29/16 Judgment and Sentence)(App.26-29).

Coleman filed a notice of appeal on May 25, 2016. (Certified Notice of Appeal)(App.30-31).

Subsequent to the filing of the Notice of Appeal, Coleman's suspended sentence probation was revoked herein. At that time, the court imposed an indeterminate term of incarceration not to exceed 15 years, to be served concurrently with the sentence in separately pending AGCR202305. The court again found defendant not reasonably able to pay court-appointed attorney fees and expenses associated with the probation revocation matter. (11/21/16 Order Revoking Probation)(App.34-36).

Facts: Having been previously convicted of a sex offense, Coleman was required to comply with sex offender registry requirements. (Jury Instruction 15 at element 1; Exhibit A: Stipulation)(App.22, 24). Coleman had registered with the Black Hawk County Sheriff's Office, listing as his principal

place of residence his parents' home in Waterloo, where he lived with his parents and adult sister. (Trial p.156 L.6-p.157 L.10, p.172 L.1-2, p.195 L.2-4, p.199 L.4-7).

Separate from and in addition to his registration obligations under the sex offender registry, Coleman was also subject to probation monitoring. The requirements of Coleman's probation (as distinct from the sex offender registry) included monitoring[2] and curfew obligations. In contrast, the sex offender registry does not impose a curfew or require law enforcement to know where the offender is at all times. It requires only that the offender register statutorily enumerated information, and notify the sheriff within five business days when certain triggering events occur as defined in the statute. (Trial p.145 L.12-23, p.153 L.2-22, p.201 L.25-p.202 L.17).

The instant sex offender registry prosecution was based on the allegation that Coleman had "failed to… notify the

[2] Coleman's probation conditions included GPS monitoring with an ankle bracelet. However, the district court excluded reference to GPS or electronic monitoring. Accordingly, reference was made only to "monitoring" in the jury's presence at trial. (Trial p.110 L.10-p.112 L.4, p.112 L.22-p.115 L.7, p.116 L.16-21, p.139 L.14-p.141 L.18, p.143 L.16-p.144 L.24).

Black Hawk County sheriff within five business days of any location in which the offender is staying when away from the principal place of residence… for more than five days.…" (Jury Instruction 15, at element 2)(App.22).

During August 2015, an (undisclosed) issue[3] arose with Coleman's probation supervision and monitoring; as a result, Probation Officer Todd Harrington called Coleman on August 15, 2015 to advise him of the issue, and that it would need to be resolved. Harrington reached and actually spoke with Coleman on that occasion. Harrington could not recall whether he had reached Coleman at his residence's landline at that time. (Trial p.137 L.8-p.138 L.7, p.145 L.8-23, p.146 L.24-p.148 L.2, p.149 L.2-8).

Due to a change in Probation Officer Harrington's employment, Coleman's supervision was subsequently

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[3] The monitoring issue that arose was that the ankle monitor was running low on battery. Harrington contacted Coleman to advise him to address the low-battery issue. (Trial p.139 L.14-p.140 L.1). But because the district court excluded reference to GPS or electronic monitoring, reference was made only to a monitoring issue or problem in the jury's presence at trial. (Trial p.110 L.23-p.111 L.3, p.111 L.24-p.112 L.4, p.112 L.22-p.113 L.1).

transferred to Probation Officer Mark Blatz. (Trial p.134 L.3-9, p.134 L.18-23, p.137 L.20-p.138 L.4, p.138 L.8-11, p.148 L.5-15). On August 25, 2015, Blatz tried calling Coleman but was unable to reach him; he left a telephone message. Blatz tried calling Coleman again on August 26, but was still unable to reach him. (Trial p.149 L.2-p.150 L.16). At that time (on August 26), Blatz made contact with Coleman's father, who indicated Coleman was not presently at the residence, and that he had not seen him. Blatz then contacted law enforcement to request help locating Coleman. (Trial p.150 L.22-p.151 L.6).

At 9:30 a.m. on August 27, 2015, Sergeant Steve Peterson and DCI Agent Jack Liao went to Coleman's residence and spoke with his father, Michael. Michael told law enforcement that he and his wife had been out-of-state for about a week, and that he hadn't seen Coleman since returning home around August 16th or 17th. (Trial p.206 L.13-p.209 L.2). At one point, Sergeant Peterson and Agent Liao testified that, while talking with Sergeant Peterson,

Michael settled on having returned on August 16. (Trial p.209 L.4-13, p.264 L.18-p.266 L.9). But Sergeant Peterson subsequently testified Michael said he returned "either August 16 or August 17" and "maybe onto the 17th", and his later testimony assumed Michael returned on the August 17. (Trial p.209 L.14-18, p.217 L.2-4); (Exhibit B)(App.25). During trial, Michael testified that he definitely returned on a Monday, which would make his return date Monday August 17 not Sunday August 16. (Trial p.158 L.6-p.159 L.20, p.163 L.9-14); (Exhibit B)(App.25).

Sergeant Peterson and Agent Liao testified Michael seemed concerned that he hadn't seen his son. (Trial p.209 L.23-p.210 L.2, p.264 L.1-4). At trial, Michael testified that he was not overly concerned that he hadn't seen his son since returning from his trip. He explained that his son's schedules (like his and his adult daughter's schedules) often crossed. Michael worked during the day, went to bed around 9:30 or 10 p.m. at night, and was unusually tired during the pertinent time period because of chemotherapy treatments connected to

his recent diagnosis with stage four cancer. Coleman also worked construction during this period, which meant he worked different hours. (Trial p.161 L.17-p.162 L.6, p.169 L.25-p.172 L.11). Michael testified it was not unusual for three days to go by without his seeing Defendant. (Trial p.160 L.11-13, p. 171 L.24-p.172 L.1).

Michael told the officers that his son didn't have a key to the residence and could not get in unless someone was there to let him in. (Trial p.167 L.22-p.168 L.8, p.210 L.3-12). During trial, Michael clarified that Defendant did have a key to the residence, but Michael had assumed he lost it because Michael's daughter mentioned she had to let Defendant into the house on one occasion during the week Michael was out of town. Michael testified that, subsequent to his speaking with the officers, he learned that Defendant did still have his key to the back door of the residence. (Trial p.172 L.12-p.174 L.3, p.185 L.5-23). Both Michael and the officers testified that Michael told law enforcement all of his son's belongings

remained at the residence. (Trial p.169 L.4-11, p.174 L.25-p.175 L.10, p.239 L.4-6, p.277 L.23-p.278 L.15).

Michael played for the officers some phone messages left on the home phone system. One of the recordings was from a female named "Robin" leaving a message for Coleman that she was at Motel 6, indicating he was supposed to meet her there, and asking him to call. Sergeant Peterson's recollection was that the message was left "I think, over August 15th and 16th, or something like that." From the message, it sounded as if the meeting was pre-arranged, and that Robin had come into town specifically to meet with Coleman. (Trial p.211 L.7-p.212 L.9, p.265 L.8-24, p.275 L.1-11).

The officers left the Coleman residence and went to Motel 6 in Waterloo to see if they could locate Coleman or the female ("Robin") who left the telephone message. Hotel management identified a Robin that had been registered at the motel during the weekend of August 16. While Sergeant Peterson researched Robin's name to try to locate contact information in law enforcement's computer system, Agent Liao talked with

other persons in the motel. A motel employee (Darcy Smith) indicated to Agent Liao that Coleman was presently there in her room at the motel. Smith told Agent Liao that Coleman had stopped by the motel on the previous day (August 26) and asked her to give him a ride somewhere. Smith told Coleman she was unable to give him a ride, at which time Coleman went up to sleep on the bed in Smith's room at the motel. (Trial p.212 L.10-p.214 L.20, p.237 L.13-24, p.266 L.25-p.267 L.7).

The officers went up to the motel room, and saw Coleman in the room, sitting on a bed. (Trial p.213 L.21-23, p.267 L.8-13, p.268 L.12-20). Sergeant Peterson asked Coleman where he'd been, and Coleman responded that he had just returned from the Cedar Rapids area. (Trial p.214 L.12-18). No personal belongings of Coleman's were located in or collected from the room. (Trial p.238 L.12-18, p.274 L.9-25). Coleman was arrested on grounds of a probation violation; later that same day, an additional charge of a sex offender registry

violation was also added. (Trial p.215 L.1-4, p.237 L.25-p.238 L.5, p.269 L.24-12, p.271 L.14-17, p.273 L.14-24).

On August 28, 2015, while in jail, Coleman sent a "kite" or request to speak with law enforcement. He acknowledged to police that he had disappeared but said that his disappearance wasn't voluntary. He stated that he had been taken by some people from Waterloo to the area of Cedar Rapids, Hiawatha, and Marion in connection with some debt they believed him to owe, before they would bring him back to the Waterloo area. (Trial p.218 L.17-p.219 L.20, p.228 L.16 - p.229 L.7, p.229 L.250-p.230 L.13, p.269 L.13-p.270 L.19, p.271 L.3-13). The areas described (Cedar Rapids, Hiawatha, and Marion) are all within an hour of Waterloo. (Trial p.231 L.19-p.232 L.1, p.273 L.11-13). The officers acknowledged that they did not ask and Coleman did not specify the start date of his disappearance or absence from his residence. Law enforcement also did not ask and Coleman did not specify that he was gone continuously during any particular time period.

(Trial p.232 L.11-23, p.235 L.11-p.236 L.8, p.249 L.8-24, p.273 L.2-10, p.283 L.7-15).

Dawn DeMaro is the Sex Offender Registrar with the Black Hawk County Sheriff's Office. (Trial p.195 L.2-4). DeMaro testified that Coleman had not appeared in her office to make any notification between August 16 and August 27, 2015. (Trial p.201 L.5-18).

The defense presented testimony from Judy Long, an investigator for the Public Defender Office. (Trial p.292 L.7-11). At the time individuals are arrested and booked into jail, their personal effects are taken by the jail and stored in a secure property room accessible only to jail staff. (Trial p.275 L.15-19, p.293 L.5-16). Long testified that she retrieved from Defendant's booking property at the jail, a set of keys. (Trial p.292 L.14-p.296 L.3). She then took the keys to the Coleman residence and asked Defendant's mother to see if one of the keys would unlock the back door. Defendant's mother did so and, in Long's personal presence, twice demonstrated that the

key on Defendant's key ring unlocked the back door to the Coleman residence. (Trial p.296 L.4-p.298 L.18).

At trial, the dispute centered on (1) whether Defendant had actually been absent from the residence for more than five days, triggering an obligation to notify; and (2) whether Defendant's time to notify the sheriff of any such absence had expired by the time of his arrest.

Other relevant facts will be discussed below.

ARGUMENT

I. THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THAT COLEMAN FAILED TO NOTIFY THE SHERIFF "WITHIN FIVE BUSINESS DAYS" OF HIS STAYING "AWAY FROM THE PRINCIPAL... RESIDENCE... FOR MORE THAN FIVE DAYS."

A. Preservation of Error: Coleman moved for a judgment of acquittal on grounds that the registry violation had not been established. (Trial p.287 L.23- p.290 L.13, p.364 L.22-p.365 L.14). The motion for judgment of acquittal preserved error on the issue presented. State v. Allen, 304 N.W.2d 203, 206 (Iowa 1981)(A motion for judgment of

acquittal is a means for challenging the sufficiency of the evidence to sustain a conviction).

In the event this Court determines trial counsel's motion for judgment of acquittal was insufficient to preserve error for any reason, Coleman respectfully requests that this issue be considered under the Court's familiar ineffective assistance of counsel framework. See State v. Tobin, 333 N.W.2d 842, 844 (Iowa 1983).

B. Standard of Review: Where preserved for appellate review, challenges to the sufficiency of the evidence are reviewed for correction of errors at law. State v. Petithory, 702 N.W.2d 854, 856 (Iowa 2005). This is equally true where the question turns on issues of statutory interpretation. State v. Johnson, 528 N.W.2d 638, 640 (Iowa 1995).

Alternatively, to the extent this issue is considered under an ineffective assistance of counsel framework, review is de novo. Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984). A defendant claiming a violation of his right to the effective assistance of counsel must establish: (1) counsel's

performance fell below an objective standard of reasonableness and (2) counsel's deficient performance prejudiced the defense. Id. at 685. As noted by our Supreme Court "[i]t would surely be ineffective… if… counsel failed to preserve a valid motion for judgment of acquittal" and the "prejudice prong would obviously be satisfied where acquittal would have resulted if trial counsel had preserved the motion." State v. Schories, 827 N.W.2d 659, 664 (Iowa 2013). Thus to prevail on a sufficiency of the evidence challenge raised under an ineffective-assistance rubric, a defendant need only establish that a properly made "motion [for judgment of acquittal] would have been meritorious." Id.

C. Discussion: The burden is on the State to prove every fact necessary to constitute the offense with which a defendant has been charged. State v. Gibbs, 239 N.W.2d 866, 867 (Iowa 1976). To withstand a sufficiency of the evidence challenge, a jury's verdict of guilt must be supported by substantial evidence. State v. Hopkins, 576 N.W.2d 374, 377 (Iowa 1998). Substantial evidence means evidence which

would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984). In determining if there is substantial evidence to support the charge, evidence must be viewed in the light most favorable to the State, and consideration must be given to all of the evidence, not just the evidence supporting the verdict. Petithory, 702 N.W.2d at 856-57. To suffice, the evidence presented must raise a fair inference of guilt on every element and do more than create speculation, suspicion, or conjecture. State v. Hamilton, 309 N.W.2d 471, 479 (Iowa 1981). Evidence that allows two or more inferences to be drawn, without more, is insufficient to support guilt. State v. Truesdell, 679 N.W.2d 611, 618–619 (Iowa 2004).

The evidence presented at trial was insufficient to establish that Coleman failed to notify the sheriff "within five business days" of his staying "away from the principal… residence… for more than five days." (Jury Instruction 15) (App.22). See also Iowa Code 692A.105 (2015).

As pertinent hereto, the marshalling instruction required the State to prove that:

> 2. On or about August 15, 2015, through August 27, 2015, the defendant failed to appear in person and notify the Black Hawk County sheriff ***within five business days*** of any location in which the offender is staying ***when away from the principal place of residence of the offender for more than five days***, and identifying the location and the period of time the offender is staying in such location.

(Jury Instruction 15)(App.22). This language was modeled after Iowa Code section 692A.105 (2015).

During trial, the parties disagreed regarding the time period within which an offender must make notification of his absence from the principal residence for more than five days. Specifically, the parties offered the jury conflicting theories of when the five-business-day clock for making notification would start running under the law. The State argued that, if an offender *will be* away from the principal residence for more than five days, he must notify the sheriff within five business days of when he *initially leaves* the residence. (Trial p.200 L.5-19, p.215 L.9-17, p.217 L.3-16, p.245 L.16-24, p.282 L.8-

18, p.321 L.11-22, p.357 L.23-p.358 L.11, p.358 L.16-p.359 L.25). Defense counsel, on the other hand, argued that the obligation to notify is not triggered until the offender is away from the principal residence for more than five days, and that it is only once such triggering condition is fulfilled (on the sixth day of absence) that the five-business-day clock for making notification starts running. (Trial p.345 L.2-p.347 L.5-p.348 L.18, p.349 L.21-24).

In determining whether there was sufficient evidence to sustain the jury's verdict of guilt, this Court must first consider and determine what the criminal statute requires. State v. Showens, 845 N.W.2d 436, 441 (Iowa 2014). No Iowa Appellate Court appears to have yet construed the language of Iowa Code section 692A.105.

The ultimate purpose of statutory interpretation is to give effect to legislative intent. State v. Bower, 725 N.W.2d 435, 442 (Iowa 2006). The statute must be considered as a whole. State v. Iowa Dist. Ct. for Scott Co., --- N.W.2d ---, 2017 WL 242652, at *5 (Iowa 2017). If a statute is unambiguous, its

plain meaning will be given effect. But if reasonable minds could differ or be uncertain as to the meaning of the statute, tools of construction are employed to resolve the ambiguity. Id. at *4. In discerning legislative intent, "[t]he object of a law matters", Id. at *5, but courts "search for intent from what the legislature said, rather than what it should or might have said", State v. Reiter, 601 N.W.2d 372, 373 (Iowa 1999). "Practicality is also important" and courts "try to interpret statutes so they are reasonable and workable" and avoid absurd results. Iowa Dist. Ct., ---N.W.2d---, 2017 WL 242652, at *6. Additionally, "penal statues must give fair warning of the conduct prohibited…, and are to be construed strictly, with doubt resolved in favor of the accused." Reiter, 601 N.W.2d at 373 (citation omitted). If possible, statutory language will be construed "to sidestep a potential vagueness defect" or other constitutional infirmity. Showens, 845 N.W.2d at 441.

The instant case concerns the notification obligation imposed by Iowa Code section 692A.105, which provides:

> In addition to the registration provisions specified in section 692A.104, a sex offender, ***within five business days of a change***, shall also appear in person to notify the sheriff of the county of principal residence, of any location in which the offender is staying ***when away from the principal residence of the offender for more than five days***, by identifying the location and the period of time the offender is staying in such location.

Iowa Code § 692A.105 (2015)(emphasis added). This section provides an offender five business days from the pertinent "change" within which to make the requisite notification. Iowa Code § 692A.105 (2015). Except to the extent that "the context otherwise requires", "[c]hange" means "to add, begin, or terminate." Iowa Code § 692A.101(5) (2015). Substituting the statutory definition of "Change" for that word in 692A.105 would provide that the offender, "within five business days of a[n] [add(ition), begin(ing), or terminat(ion)], shall… notify the sheriff…, of any location in which the offender is staying when away from the principal residence of the offender for more than five days…." See Iowa Code §§ 692A.101(5), 692A.105 (2015). But such language begs the question: addition, beginning, or termination *of what*? Context indicates that,

under section 692A.105, what is meant by "within five business days of a *change*", is 'within five business days of *fulfillment of the condition requiring notification*.' It must thus be determined what event triggers the obligation to notify under section 692A.105.

The language of section 692A.105 references two separate and distinct time frames. One time frame governs the period after which an absence from the principal residence triggers an obligation to notify – an absence of more than five days. And a second and different time frame governs the period in which the offender has to make that required notification – five business days.

The triggering event that requires notification under section 692A.105 is that the offender is "away from the principal residence… for more than five days." That is, the obligation to notify is triggered on the sixth day of absence from the residence. An offender who fails to notify the sheriff that he is staying at a location other than the principal residence does not violate section 692A.105 if he is not

ultimately away from the residence "for more than five days." Thus, even an offender who leaves the residence on day one, *intending* to be away for six days, does not violate the statute with his failure to notify if he ultimately (contrary to his initial intent or belief) returns to the residence on the fifth day. Conversely, even an offender who initially leaves *intending* to return to the residence the following day will subsequently incur an obligation to notify if his stay away is extended or delayed so that he is ultimately away for more than five days. Thus, it is not the defendant's act of leaving the residence (with or without the intention or belief that he will be away for more than five days) that triggers an obligation to notify; it is the act of actually having been away from the residence for more than five days.

In the district court, the State suggested that an offender must notify the sheriff if he is *going to* be away or *will be* away from the residence for more than five days. (Trial p.200 L.5-19, p.215 L.9-17, p.217 L.3-16, p.245 L.16-24, p.282 L.8-18, p.321 L.11-22, p.357 L.23-p.358 L.11, p.358 L.16-p.359 L.25).

It is unclear whether, under the State's interpretation, the notification period would run (a) from the first day the offender leaves the residence, or (b) from the day the offender forms the intention to be absent from the residence for more than five days (even if not actually absent), or (c) from the day the offender is *both* absent from the residence *and* has intent to be away from the residence for more than five days. Defendant respectfully urges that none of the foregoing is a correct interpretation of the statute. Rather, the event triggering the obligation to notify under the statute (and therefore starting the five-business-day notification period), is that the offender is actually absent from the residence for more than five days.

If the legislature had intended the five-business-day clock for making notification to run from the first date of absence or from the date an intention to be gone for more than five days is formed, it could have so-specified. See e.g., OHIO REV. CODE. ANN. § 2950.04(2)(a) (2015)(offender must register "within three days *of the offender's coming into a county* in which the offender resides or temporarily is domiciled for more

than three days.")(emphasis added); MICH. COMP. LAWS 28.725(5)(1)(e) (2015)(an individual must report if "[t]he individual *intends to* temporarily reside at any place other than his or her residence for more than 7 days.")(emphasis added); 730 ILL. COMP. STAT. ANN. 150/30 (2015)(if offender "*intends to* establish a residence or employment" outside Illinois, they must report "at least 10 days *before* establishing that residence or employment")(emphasis added); ALA. CODE § 15-20A-15 (2015)(If offender "*intends to* travel to another country, he or she shall report… at least 21 days *prior to* such travel."; Additionally, if "temporarily leaving from his or her county of residence for a period of three or more consecutive days" offender must report "*prior to* leaving his or her county of residence")(emphasis added); TEX. CODE. ANN. § 62.051 (2015) (person must register in locality "where the person… *intends to reside* for more than seven days" and registration must be accomplished "not later than… the seventh day *after the person's arrival* in the" locality) (emphasis added). Nor does the statute provide that the offender must notify if they "will

be" away from the principal residence for more than five days. Compare MD. CODE ANN. § 11-705 (2015)(registrant must notify "when the registrant *will be* absent from the registrant's residence… for more than 7 days" and such "[n]otification… shall… be made… *prior to… commencing the period of absence*") (emphasis added); IND. CODE § 11-8-8-18(a) (2015) ("A sexually violent predator who *will be* absent from the… principal residence for more than 72 hours shall" notify) (emphasis added); N.C. GEN. STAT. § 14-208.8A (2015) (notification must be made "within 72 hours after the person *knows or should know* that he or she *will be* working and maintaining a temporary residence" in another county) (emphasis added).

The statute must be interpreted in such a way that the time-frame for notifying (five business days) runs *after* the event triggering the obligation to notify (staying away for more than five days). A contrary interpretation would generate the absurd result of the notification period potentially expiring before the event triggering the notification obligation comes

into existence. See State v. Sommerfield No. 14-05-23, 2006 WL 758747, at *6 (Ohio App. Ct. March 27, 2006)(Where statute requires registration "within five days of… coming into a county in which offender resides… for more than five days", the statute must mean the offender has resided in the county for five consecutive days not five days in a lifetime; the contrary interpretation would result in absurd result of the five-day period for registration expiring before the triggering event of residing in the county for five days occurs.). Under the State's interpretation of the statute, the time to notify (five business days of leaving the residence) would start running and could well expire *before* the event triggering an obligation to notify (being away for more than five days) occurs. For example, a defendant who leaves on Sunday would see the five-business-day period expire on Friday, but they would not be away for more than five days until a day later on Saturday.

Defendant's reading of the statute is consistent with the overall aim of Chapter 692A. As emphasized by trial counsel below, Chapter 692A does not act as a mechanism for

providing around-the-clock monitoring or curfew. That is, an offender is not obligated to keep the sheriff apprised of his whereabouts or location at all times. His or her leaving the residence, even for an extended period of days, does not trigger an obligation to notify under the Chapter unless the offender either is ultimately away for more than five days (pursuant to section 692A.105) or ultimately establishes a new or additional residence (pursuant to section 692A.104(2))[4]. See Iowa Code §§ 692A.105, 692A.104(2) (2015).

Moreover, Chapter 692A generally seeks to strike a balance between requiring registration or notification (upon fulfillment of certain triggering conditions), and making that registration or notification practicable and workable by providing the offender a period of time (five business days) *after* the triggering condition is satisfied within which to

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[4] The instant prosecution was pursued only on the theory that Coleman had been absent from his residence for more than five days, not on the theory that he had established a new or additional residence elsewhere during the absence. (Jury Instruction 15)(App.22). See also (Trial p.334 L.9-20) (prosecutor noting this is not a case where State had to prove Coleman was living somewhere else, but rather only that he was absent from the residence for more than five days).

register or notify – something which must be done in person. Chapter 692A thus reflects a legislative judgment that an offender should be given five business days after the event triggering an obligation to register or notify within which to make the required notification. See Iowa Code § 692A.104(1) (2015) (offender must register "within five business days of being required to register"); § 692A.104(2) (2015) (offender must notify "within five business days of changing a residence, employment, or attendance as a student"); § 692A.104(3) (2015)(offender must notify "within five business days of a change in relevant information"); § 692A.104(5) (2015) (offender must notify and register "within five business days of the establishment of a residence, employment, or attendance as a student in another jurisdiction").

Defendant's reading also harmonizes the time-frame for making notification under section 692A.105 with the time frame for making notification under other sections of that chapter. That is, the five-business-day clock for making notification generally starts running from fulfillment of the

condition requiring notification – from the change of residence, change of employment, change of status as a student, etc. See Iowa Code §§ 692A.104(1)-(3), (5) (2015); 692A.105 (2015). The obligation is not to notify *at or before* the time the condition requiring notification is fulfilled but, rather, to notify within five business days *after* the condition is fulfilled. Under section 692A.105, the condition requiring notification is that the defendant is away from the residence for more than five days. That is, the obligation to notify is triggered on the sixth day of absence from the residence. The five-business-day clock thus does not start ticking until this condition is fulfilled, and the time period for notifying does not run until five business days *after* this condition is fulfilled.

Defendant's interpretation best comports with the language of the statute, and also gives effect to the legislative intention that an offender be given five business days *after fulfillment of the condition triggering the obligation to notify* within which to make notification. Moreover, to the extent any ambiguity remains on that question, the rule of lenity

supports the defendant's interpretation. Finally, except to the extent this construction is adopted, the statute fails to provide adequate notice and is unconstitutionally vague as to when notification must be made.

This Court should now hold that, under Iowa Code section 692A.105, the obligation to notify is triggered when the offender is "away from the principal residence of the offender for more than five days" – namely, on the sixth day of absence. Once that triggering condition is fulfilled, the offender *then* has "five business days" within which to notify the sheriff. That is, the five-business-day clock for making notification starts running on the sixth day of absence from the residence.

Under this interpretation of the statute, the evidence presented at trial was insufficient to establish that Coleman committed a registry violation as charged.

Monday August 17 (the date Michael Coleman returned to the residence) is the earliest date the jury could find Defendant to be first absent from the residence. If Defendant left the residence on August 17, he would be absent for five

days on Saturday August 22 and would be absent for more than five days on Sunday August 23 (the sixth day of absence). That day is not a business day, so the five-business-day notification period would commence on Monday August 24 and would lapse at the close of business on Friday August 28. However, Coleman was arrested and jailed on Thursday August 27, the day *before* the notification period lapsed.[5] No violation was thus established.

During trial, the State urged that the jury could find Coleman's absence from the residence commenced as early as Saturday August 15. As an initial matter, Coleman urges that substantial evidence would not sustain August 15th as the first date of absence.[6] More importantly, however, even

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[5] Once Coleman was arrested and incarcerated, his obligation to comply with the registration provisions of Chapter 692A was suspended. Iowa Code § 692A.103(2) (2015).

[6] Probation Officer Todd Harrington testified that a problem with Coleman's probation monitoring arose on August 15 – Specifically that Harrington could not confirm Coleman was where he was meant to be. (Trial p.137 L.8-19, p.138 L.5-7, p.145 L.18-23, p.146 L.9-14). But the mere fact that Harrington could not *confirm* Defendant was at the residence (such as due to a non-functioning GPS ankle monitor) does not amount to substantial evidence that Defendant was

assuming August 15th to be the first date of absence, a violation would still not be established. If Coleman left the residence on August 15, the condition of being away for more than five days would be satisfied on Friday August 21st (the sixth day of absence). The five-business-day notification period would thus commence on August 21 (the sixth day of absence) and would lapse at the close of business on Thursday August 27th. However, Coleman was arrested and jailed *prior to* the close of business (and, therefore, before the notification period lapsed) on August 27th.[7] Accordingly, no violation was established.

Finally, to the extent this Court alternatively concludes that the event starting the five-business-day notification period is the offender leaving the residence with the intention

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affirmatively *absent* from the residence. Indeed, Harrington could not deny that he may have reached Coleman on the residence's landline, which would indicate that Coleman was actually home. (Trial p.146 L.24-p.147 L.4). See also (Trial p.144 L.11-14).

[7] Law enforcement spoke with Michael Coleman at his residence in Waterloo at 9 or 9:30 a.m. on August 27, 2015, then "immediately" went to the Motel 6 (also in Waterloo) where they located and arrested Coleman. (Trial p.207 L.1-10, p.212 L.19-21, p.237 L.25-p.238 L.5, p.265 L.25-p.266 L.4).

of remaining away for more than five days, Coleman notes that no evidence was presented that he left with such an intention or belief, nor of when any such intention or belief was formed. Therefore, no violation was established even on this alternative interpretation of the statute.

D. <u>Conclusion</u>: Coleman respectfully requests that this Court reverse his conviction and remand this matter to the district court for entry of a judgment of acquittal.

II. WHETHER THE INSTRUCTIONS FAILED TO PROPERLY INFORM THE JURY (1) OF WHEN THE FIVE-BUSINESS-DAY NOTIFICATION PERIOD STARTS RUNNING; AND (2) OF HOW PROPERLY TO COMPUTE TIME (COUNT DAYS) IN EVALUATING WHETHER A REGISTRY VIOLATION OCCURRED?

A. <u>Preservation of Error</u>: During the jury instruction conference, Coleman objected to the marshalling instruction (Jury Instruction 15) on grounds that the its mere recitation of the statutory language is "confusing" and the time requirements under the statute should instead "be split out" to explicitly specify that "first of all, you have to be away for five days and *then* you have to… fail to register" within five

business days. (Trial p.307 L.5-15, p.309 L.20-22)(emphasis added). Error was thus preserved on the claim that the court did not properly instruct the jury OF the event which will start the five-business-day notification period running. See State v. Ondayog, 722 N.W.2d 778, 785 (Iowa 2006) ("[T]imely objection to jury instructions in criminal proceedings is necessary to preserve alleged error for appellate review…."). Alternatively, to the extent this Court concludes error was not properly preserved for any reason, Coleman respectfully requests that the issue be considered under the Court's familiar ineffective assistance of counsel framework. See State v. Tobin, 333 N.W.2d 842, 844 (Iowa 1983).

Appellant acknowledges that trial counsel did not specifically request an instruction informing the jury of how to properly compute time (count days). This instructional error should thus be considered under the Court's familiar ineffective assistance of counsel framework. See Id.

Additionally, to the extent this Court concludes that counsel did not properly preserve the above-referenced

instructional error inhering in the marshalling instruction, that issue should also be considered under an ineffective assistance of counsel framework.

B. Standard of Review: Where preserved for appellate review, challenges to jury instructions are reviewed for correction of errors at law. State v. Anderson, 636 N.W.2d 26, 30 (Iowa 2001). Such instructional error is subject to harmless error analysis. State v. Hanes, 790 N.W.2d 545, 550 (Iowa 2010). Our appellate courts "presume prejudice and reverse unless the record affirmatively establishes there was no prejudice." Id. at 551.

To the extent this issue is considered under an ineffective assistance of counsel framework, review is de novo. Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984). A defendant claiming a violation of his constitutional right to the effective assistance of counsel must establish: (1) counsel's performance fell below an objective standard of reasonableness and (2) counsel's deficient performance prejudiced the defense. Id. at 685. Prejudice is established by

showing "a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 669, 104 S.Ct. 2052, 2055, 80 L.Ed.2d 674 (1984). A reasonable probability is one sufficient to undermine confidence in the outcome. Gering v. State, 382 N.W.2d 151, 153-54 (Iowa 1986).

C. Discussion: The district court "is required to 'instruct the jury as to the law applicable to all material issues in the case....'" State v. Marin, 788 N.W.2d 833, 837 (Iowa 2010) (quoting Iowa R. Civ. P. 1.924). "[T]he court is not required to give any particular form of an instruction" but "must... give instructions that fairly state the law as applied to the facts of the case." Id. at 838. Additionally, "a court is required to give a requested instruction when it states a correct rule of law having application to the facts of the case and when the concept is not otherwise embodied in other instructions." State v. Lyman, 776 N.W.2d 865, 876 (Iowa

2010)(quoting Herbst v. State, 616 N.W.2d 582, 585 (Iowa 2000)).

Trial counsel has a duty to know the applicable law, protect the defendant from conviction under a mistaken application of the law, and make sure the jury instructions correctly reflect the law. See State v. Goff, 342 N.W.2d 830, 837-38 (Iowa 1983); State v. Allison, 576 N.W.2d 371, 374 (Iowa 1998); State v. Hopkins, 576 N.W.2d 374, 379-80 (Iowa 1998). While counsel has no duty to raise an issue that has no merit, State v. Dudley, 766 N.W.2d 606, 620 (Iowa 2009), the fact that an issue is one of "first impression" does not excuse trial counsel's failure to raise it, State v. Westeen, 591 N.W.2d 203, 210 (Iowa 1999). "In situations where the merit of a particular issue is not clear from Iowa law, the test 'is whether a normally competent attorney would have concluded that the question . . . was worth raising.'" Millam v. State, 745 N.W.2d 719, 721-22 (Iowa 2008) (quoting State v. Graves, 668 N.W.2d 860, 881 (Iowa 2003)). See also State v. Schoelerman, 315 N.W.2d 67, 72 (Iowa 1982). Although trial counsel is not

required to "be a 'crystal gazer'" in predicting future changes in law, counsel does have a duty to "exercise reasonable diligence in deciding whether an issue is worth raising." Westeen, 591 N.W.2d at 210 (internal quotation marks omitted). See also Dudley, 766 N.W.2d at 623 (counsel ineffective for failing to raise meritorious legal argument which was "worth asserting.").

1). The instructions were faulty in that they did not specify when the five-business-day notification period starts running:

The marshalling instruction did not adequately convey to the jury the elements of the offense. Namely, it failed to accurately instruct the jury on when the five-business-day notification period starts running.

As discussed above in Division I, the five-business-day notification period does not start running until the point in time that the offender has been continuously absent from the residence for a period of more than five days. That is, the obligation to notify is triggered, and therefore the five-business-day period for notification starts running, on the

sixth day of absence from the residence. However, the instruction submitted to the jury merely recites the statutory language without specifying to the jury that the notification period does not start running until after the offender has been away for more than five days.

The error was not harmless. The defense and State argued to the jury differing theories of what the law required. The State urged during argument that the law required notification within five business days *of leaving* the residence. (Trial p.321 L.11-22, p.357 L.23-p.358 L.11, p.358 L.16-p.359 L.25). The State also elicited testimony from its witnesses that the obligation to register runs from the date the offender leaves the residence. (Trial p.200 L.5-19, p.215 L.9-17, p.217 L.3-16, p.245 L.16-24, p.282 L.8-18). Absent an instruction specifically clarifying that the five-business-day clock for notifying does not start running until the condition requiring notification (being away for more than five days) is satisfied, there is no assurance that the jury would have properly understood this requirement. Even under an ineffective

assistance of counsel framework, confidence in the outcome is undermined and a new trial must be afforded.

Alternatively, if this Court instead concludes the five-business-day notification period commences at the time the offender leaves the residence with knowledge or intention to remain away for more than five days, the marshalling instruction was still deficient in failing to include this requirement. Counsel breached an essential duty and Coleman was prejudiced thereby. No evidence was presented that Coleman knew or intended, at the time he left the residence, that he would be away for more than five days. There is a reasonable probability that, but for counsel's breach in failing to ensure the instructions accurately reflected the requirements of the offense, Coleman would have been acquitted. Coleman should now be afforded a new trial.

2. The instructions were faulty in that they did not inform the jury of how properly to compute time (count days) in evaluating whether a registry violation occurred:

Iowa Code section 692A.105 provides that an obligation to notify arises if the offender is away from the principal

residence "for more than five days." Additionally, Iowa Code section 692A.105 provides that an offender must notify the sheriff "within five business days" of the triggering event. Iowa Code § 692A.105 (2015). The instructions were deficient in that the jury was not informed of how to calculate time for each of these periods.

a). Exclusion of First Day:

Pertinent to time computations for statutory deadlines like the one imposed by section 692A.105 is the language of Iowa Code section 4.1(34). That section provides, in pertinent part: "In computing time, the first day shall be excluded and the last day included." No instruction was provided informing the jury that, in calculating the more-than-five-day period of absence and the five-business-day period for notification, "the first day shall be excluded". Iowa Code § 4.1(34) (2015). Such time-calculation rule, imposed by statute, is not within the common knowledge of a jury. An instruction should have been provided conveying such time-computation rule to the jury.

Trial counsel breached an essential duty in failing to request that the jury be instructed of the time computation rule. Coleman was prejudiced by counsel's breach. The jury was not informed that "the first day shall be excluded" in calculating the more-than-five-day absence period and in calculating the five-business-day notification period. If the jury included the first day in calculating these periods, it would shorten the time-frames for concluding that (1) the period of absence was met, and that (2) the deadline for notification had lapsed, leading the jury to find they were satisfied a day before they would actually be satisfied under the law. The fighting issues at trial were whether the state had established that these time periods had lapsed. Depending on when the jury fixed Coleman's first day of absence from the residence, the correct calculation of these time periods could make the difference between conviction and acquittal. This is true even if this Court concludes (contrary to Defendant's argument above in Division I) that the five-business-day-notification period runs from the first date the

offender is absent. For example, if the jury found Coleman was absent beginning on Thursday August 20th[8], the proper calculation (excluding the first day but including the last) would be that the five-business-day notification period would lapse at the close of business on Thursday August 27 and that it therefore had not yet lapsed when Coleman was arrested prior to the close of business on that date. However, if the jury counted the first day in its calculation, it would conclude the five-business-day notification period ran on Wednesday August 26 – the day *before* Coleman was arrested.

[8] The jury could have reached this conclusion, for example, based on Michael Coleman's testimony that he returned to the residence on August 17, that he and Coleman's schedules regularly conflicted, and that it was not unusual for him to go days at a time without seeing Coleman. (Trial p.158 L.6-p.159 L.20, p.161 L.17-p.162 L.6, p.163 L.9-14, p.169 L.25-p.172 L.11, p.160 L.11-13, p. 171 L.24-p.172 L.1); (Exhibit B) (App.25). Any finding of guilt had to be "beyond a reasonable doubt." (Jury Instruction 7) (App.19). The jury could well have concluded it could not be sure Coleman was actually absent earlier in the 10-day period, but that he was likely absent later in the 10-day period.

b). Conception of "day" (for purposes of calculating more-than-five-day period of absence) as 24-hour period starting from time offender leaves residence:

Alternatively, if the time computation provision of section 4.1(34) does not apply to the more-than-five-day absence period, the term 'day' for purposes of this period must be understood as a 24-hour period. See *Day*, *Black's Law Dictionary* (10th ed. 2014)(defining "day" as "Any 24-your period"). Under this understanding of "day", the particular moment in time the offender initially left the residence would matter in determining when the more-than-five-day period had lapsed. That is, if an offender leaves at 10 p.m. on Sunday, he would be gone for five days at 10 p.m. on Friday, and would be gone for 'more than five days' at 10:01 p.m. on Friday. If this is the proper understanding of 'day' for purposes of the more-than-five-day absence requirement, the jury should so have been instructed. Such an instruction is important because of the implications it would have for the jury's determination of when the five-business-day notification period would commence. That is, if the 'more than five days' condition is

satisfied at 10:01 p.m. (after the close of business) on Friday, then Friday could not logically be counted as the first business day for purposes of the five-business-day notification period. The first business day would instead have to be Monday.

c). Notion that, if more-than-five-day period of absence occurs in the middle of a business day, that business day is excluded for purposes of calculating the five-business-day notification period.

If the analysis in subsection 2 is correct that the term 'day' for purposes of the more-than-five-day absence period amounts to a 24-hour period *commencing from the time the offender leaves the residence*, then it is conceivable that the offender achieves the condition of being absent for more than five days during business hours on a business day. That is, if the offender leaves at 4:00 p.m. on Sunday, he would be gone for five days at 4:00 p.m. on Friday, and would be gone for 'more than five days' at 4:01 p.m. on Friday. The jury should have been instructed that Friday would then be excluded for purposes of calculating the five-business-day notification period. That is, the jury should have been instructed that, if

the more-than-five-day period of absence occurs in the middle of a business day, that business day is excluded for purposes of calculating the five-business-day notification period. The term 'business day' must be understood as a whole business day, not a partial business day.

Proper instruction on this issue would be important also if this Court concludes the five-business-day notification period actually commences on the day the offender leaves the residence, and that the section 4.1(34) rule requiring exclusion of the first day in time computation does not apply to the five-business-day notification period, because it is conceivable an offender leaves during business hours or after business hours on a business day. The jury would need to be informed that if, for example, an offender leaves at 4:30 p.m. on Monday or at 11 p.m. on Monday, Monday is excluded for purposes of calculating the five-business-day notification period.

Again, depending on when the jury fixed Coleman's first day of absence from the residence, proper instruction on this

matter could make the difference between conviction and acquittal. Coleman must be afforded a new trial.

D. Conclusion: Defendant-Appellant James Michael Coleman respectfully requests that this Court reverse his conviction and judgment, and remand this matter to the district court for a new trial.

III. WHETHER COLEMAN WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO CHALLENGE THE TEMPORARY LODGING PROVISION OF IOWA CODE SECTION 692A.105 AS UNCONSTITUTIONALLY VAGUE UNDER THE UNITED STATES AND IOWA CONSTITUTIONS?

A. Preservation of Error: Appellate review is not precluded when failure to preserve error results from a denial of effective assistance of counsel. State v. Tobin, 333 N.W.2d 842, 844 (Iowa 1983).

B. Standard of Review: Ineffective assistance of counsel claims are reviewed de novo. Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984). A defendant claiming a violation of his constitutional right to the effective assistance of counsel must establish: (1) counsel's performance fell below

an objective standard of reasonableness and (2) counsel's deficient performance prejudiced the defense. Id. at 685.

C. Discussion: The Due Process Clauses of the United States and Iowa Constitutions prohibit vague statutes. State v. Showens, 845 N.W.2d 436, 441-442 (Iowa 2014). See also U.S. Const. amend. XIV; Iowa Const. art. I, § 9. A statute is unconstitutionally vague if it either "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" or "authorizes or even encourages arbitrary and discriminatory enforcement." Showens, 845 N.W.2d at 441 (quoting State v. Musser, 721 N.W.2d 734, 745 (Iowa 2006)).

Statutory terms will be deemed sufficiently definite to overcome a vagueness challenge if their meaning "is fairly ascertainable by reference to similar statutes, prior judicial determinations, reference to the dictionary, or if the questioned words have a common and generally accepted meaning." State v. Millsap, 704 N.W.2d 426, 436 (Iowa 2005) (quoting State v. Aldrich, 231 N.W.2d 890, 894 (Iowa 1975)).

"…[V]agueness may be cured through judicial narrowing…." State v. Nail, 743 N.W.2d 535, 540 (Iowa 2007). "In assessing whether a statute is void-for-vagueness this court employs a presumption of constitutionality and will give the statute any reasonable construction to uphold it." Showens, 845 N.W.2d at 441 (quoting Formaro v. Polk Co., 773 N.W.2d 834, 837 (Iowa 2009)). However, in a vagueness challenge to a criminal statute, the standard of certainty required by due process is significantly higher than in those situations involving civil remedies. Knight v. Iowa District Court, 269 N.W.2d 430, 432 (Iowa 1978)(citing Winters v. New York, 333 U. S. 507, 515, 68 S.Ct. 665, 670, 92 L.Ed.2d 840, 849 (1948)).

Iowa Code section 692A.105 is unconstitutionally vague because it provides insufficient guidance on when the obligation to notify arises, and how long an individual has to comply with notification requirements.

The statute provides insufficient guidance on whether the five business days for notification runs from the date the offender initially leaves the residence, from the date the

offender forms an intention to be absent for more than five days, from the date the offender is both absent and has an intention to be absent for more than five days, or from the date on which the offender has become absent for more than five days (that is, on the sixth day).

It also provides insufficient guidance on how days are calculated for purposes of the "more than five days" absence period and for purposes of the "five business days" notification period – namely, whether the first day is counted or excluded, whether the days of absence are calculated by counting the 24-hour periods since the precise time the offender left the residence, and whether partial business days are counted in the calculation of the notification period.

Because section 692A.105 is unconstitutionally vague, reasonably competent counsel would have raised the issue. State v. Dudley, 766 N.W.2d at 620. Trial counsel "need not be a crystal gazer," and "it is not necessary to know what the law will become in the future to provide effective assistance of counsel." Snethen v. State, 308 N.W.2d 11, 16 (Iowa 1981).

But the standards for challenging vague statutes are established in Iowa law. See, e.g., Musser, 721 N.W.2d at 745 (conducting both facial and as-applied vagueness analysis). Additionally, there was no strategic reason not to bring these challenges. Thus, a reasonably competent counsel who had exercised reasonable diligence would have raised the constitutional issues. Dudley, 766 N.W.2d at 622 ("We conclude as a matter of law counsel failed to exercise reasonable diligence by not raising an issue that was clearly worth asserting.").

Trial counsel's failure to challenge the constitutionality of section 692A.105 prejudiced Coleman. Coleman was convicted under the unconstitutionally vague statute. If trial counsel had challenged the vague statute, then the trial court would have found it unconstitutional and would not have submitted the charge to the jury. Because Coleman could not have been convicted under the unconstitutional statute had his counsel challenged it, there is a reasonable probability that the result of the proceedings would have been different but for

counsel's failure. Dudley, 766 N.W.2d at 620. Thus, trial counsel's failure prejudiced Coleman.

D. Conclusion: Coleman respectfully requests that his conviction be reversed, and this matter be remanded to the district court for dismissal of the prosecution.

IV. WHETHER COLEMAN WAS DENIED A FAIR TRIAL DUE TO IMPROPER PROSECUTOR ARGUMENT?

A. Preservation of Error: Defense counsel objected to two of the improper prosecutor statements challenged herein. (Trial p.357 L.13-19, p.362 L.16-23). Defense counsel did not object to the other instances of improper prosecutor argument detailed below. However, appellate review is not precluded if failure to preserve error results from a denial of effective assistance of counsel. State v. Tobin, 333 N.W.2d 842, 844 (Iowa 1983).

B. Standard of Review: A claim of ineffective assistance of counsel is a constitutional claim. When a defendant asserts a constitutional violation, the reviewing court makes an independent evaluation of the totality of the

circumstances, which is the equivalent of a de novo review. Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984).

A defendant claiming a violation of his constitutional right to the effective assistance of counsel must establish: (1) counsel's performance fell below an objective standard of reasonableness and (2) counsel's deficient performance prejudiced the defense. Id. at 685. In order to show prejudice, a defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 669, 104 S.Ct. 2052, 2055, 80 L.Ed.2d 674 (1984). A reasonable probability is one sufficient to undermine confidence in the outcome. Gering v. State, 382 N.W.2d 151, 153-54 (Iowa 1986).

C. Discussion: A prosecutor is not an advocate in the normal meaning of the word. State v. Graves, 668 N.W.2d 860, 870 (Iowa 2003). Aside from having a duty to the public, a prosecutor also has a duty to the defendant to ensure a fair trial by complying with the requirements of due process

throughout. Id. A prosecutor's primary objective should "be to see that justice is done, not to obtain a conviction." Id. A defendant is entitled to have the case decided solely on the evidence. Id. at 874. While a prosecutor is entitled to some latitude during argument, it is clearly improper for a prosecutor to disparage the defense, Id. at 876, or to inflame or appeal to the passion and prejudice of the jury, State v. Werts, 677 N.W.2d 734, 739-40 (Iowa 2004). It is also improper to inject issues broader than legal guilt or innocence, State v. Musser, 721 N.W.2d 734, 746 (Iowa 2006), and to misstate the evidence or rely on facts not in the record, State v. Schlitter, 881 N.W.2d 380, 393 (Iowa 2016).

To establish a due process claim based on prosecutorial misconduct, a defendant must establish both (1) that misconduct occurred and (2) that the misconduct resulted in prejudice to the extent that the defendant was denied a fair trial. State v. Graves, 668 N.W.2d 860, 869 (Iowa 2003). However, no "[e]vidence of the prosecutor's bad faith" is

necessary, since "a trial can be unfair to the defendant even when the prosecutor has acted in good faith." Id.

1. The prosecutor repeatedly made inflammatory and prejudicial statements disparaging the defense.

The prosecutor acted improperly by repeatedly making inflammatory and prejudicial statements disparaging the defense:

> Now, let's talk about the law in this case because *I understand the defense, they want to -- to blow a lot of smoke around that law, make it as fuzzy as possible*.
> [DEFENSE COUNSEL]: Judge, I am going to object to that. That is not proper.
> THE COURT: [Prosecutor], keep your arguments to the -- to the statutes.
>
> (Trial p.357 L.13-19)(emphasis added).
>
> ***** *****
>
> Now, once again, we go back to this key, and I don't need to spend much time with this key. […] That's not relevant. *That's just the stories to confuse you.* […]
>
> (Trial p.360 L.4-5, p.361 L.10-11)(emphasis added).
>
> ***** *****
>
> I have presented this case to you with all of my ability. You're going to take it back to the jury room.

> The evidence in this case is totally clear, *the defense will hide behind cloud of assumption* –
>
> [DEFENSE COUNSEL]: Judge, same objection. That's improper.
>
> THE COURT: just, he's winding up here. Let's let him finish.

(Trial p.362 L.16-23)(emphasis added).

Comments which "play upon the passions of the jury… violate a prosecutor's duty to keep the record free of undue denunciations or inflammatory utterances." Werts, 677 N.W.2d at 739. In the instant case, the prosecutor did not limit his argument to a discussion of the testimony and reasonable inferences from the evidence but, rather "improperly resorted to inflammatory characterizations" of the defense presented by Coleman. Graves, 668 N.W.2d at 876. The prosecutor maligned and denigrated the defense, stating that the defense was just 'blowing smoke', telling 'stories to confuse' the jury, and 'hiding behind a cloud of assumption'. See Graves, 668 N.W.2d at 879 (prosecutor should not denigrate a defense as a sham or smoke screen).

2. The prosecutor diverted the jury from deciding the case solely on the evidence by injecting issues broader than legal guilt or innocence.

In Musser, the Iowa Supreme Court held that "the prosecutor… inappropriately diverted the jury from its duty to decide the case solely on the evidence by injecting issues broader than the guilt or innocence of the defendant…." Musser, 721 N.W.2d at 756. Specifically, the Court reasoned that, "whether a finding of guilt is 'the right thing to do' in an abstract sense is not the issue…." Id. at 755. It was thus "improper[] [for the prosecutor to] urge[] the jurors to decide the case on something other than the evidence." Id.

Here, the prosecutor improperly diverted the jury from deciding the case solely on the evidence by injecting issues broader than legal guilt or innocence:

> Just like you, I sat and listened to defense counsel state *that you should reward the defendant* with an acquittal because it is possible that he came home. Because it's possible that he came home within this time that he was away, *and therefore, you should award him* with an acquittal because of that reason. […]
>
> (Trial p.351 L.10-15)(emphasis added).

***** *****

> […] And you know, *justice is not about doing the -- the easy thing. Justice is about doing the right thing.* That's why 12 of you have been called to decide. The 12 of you have more collective wisdom than anyone else in this courtroom. That's why the law puts the most important powers in your hand. *The power to do justice. The power to do what is right*.
>
> (Trial p.362 L.9-15)(emphasis added).

Such statements diverted the jury from considering case solely on the evidence by suggesting that an acquittal of Coleman would be 'rewarding' him, and by injecting an abstract notion of 'justice' and 'the right thing' as distinct from legal guilt or innocence.

3. The prosecutor relied on facts outside the record and misstated the evidence.

The prosecutor created evidence or relied on facts outside the evidence in stating as follows:

> […] You did not hear any evidence that the time that the defendant was missing from his residence, his principal residence, that he was going back home all of those nights or all of those days, and that since his father sleeps at 7 o'clock in the night, no one managed to see him. *Unless you forget his -- his mother lives in this house that you've been told, and this -- there's a sister, a younger sister.* […]
>
> (Trial p.351 L.24-p.352 L.9)(emphasis added).

Such statement improperly suggested to the jury that Coleman's mother and younger sister did not see him in the residence either. But no testimony was presented from either Coleman's mother or his sister. At one point during trial, a State's witness sought to testify that no one in the family had seen Coleman, but defense counsel's hearsay objection was sustained and the jury was admonished to "disregard any testimony that was referring to anybody else in the family." (Trial p.264 L.5-16). It is improper for a prosecutor to argue matters stricken from the record. State v. Mayes, 286 N.W.2d 387, 392 (Iowa 1979).

Counsel also misstated facts in the record in arguing as follows:

> […] There's no assumption when *Todd Harrington told you* that he was having problems monitoring this Defendant's compliance. It's where this stems from. There's no assumption in this, hey, I am having a problem with him. *I even call him to say, hey, I need to find where you're meant to be.* There's no assumption in that. Telling us about assumptions. What else can be clearer than that? *You have a monitoring compliance, stay within the*

> *area of your monitoring compliance*. There was no assumption with that. […]
>
> (Trial p.354 L.14-23)(emphasis added).
>
> ***** *****
>
> […] The only corroborated testimony is we can't find him. We're trying to track him, *stay where you need to be, we're trying to monitor you*. The only testimony you heard is that *he fails his monitoring because they can't find him where he needs to be*.
>
> (Trial p.356 L.25-p.357 L.4).

The foregoing argument misrepresented the testimony of Probation Officer Todd Harrington. Harrington testifies only that (on August 15) he could not confirm where Coleman was because of a problem with his monitoring[9], not that he tried but were unable to locate him at his residence. Indeed, Harrington could not deny that he may have reached Coleman on the residence's landline, which would indicate that Coleman actually was home. (Trial p.146 L.24-p.147 L.4). It

[9] Evidence presented outside the jury's presence clarified that the probation monitoring problem Probation Officer Harrington had was that Coleman's GPS ankle monitor had run out of battery. (Trial p.139 L.14-p.140 L.1).

is thus not accurate that PO Harrington "can't find him where he needs to be."

"Distorting testimony" or "making unsupported statements" during closing argument is improper. Schlitter, 881 N.W.2d at 393. A prosecutor has no right to create evidence or misstate facts. State v. Carey, 709 N.W.2d 547 (Iowa 2006). It is never permissible for a prosecutor to rely in closing argument on evidence not presented to the jury. State v. Thornton, 498 N.W.2d 670, 676 (Iowa 1993). Comments going beyond the evidence are particularly dangerous in that they suggest the prosecutor has information the jury does not. Graves, 668 N.W.2d at 879. The foregoing argument was improper.

4. The prosecutor's improper statements as described above denied Coleman due process and a fair trial.

For an appellate court to find reversible error, the defendant must prove the alleged improper statements resulted in unfair prejudice. For this second prong, this Court must determine whether there is a reasonable probability the

prosecutor's error prejudiced, inflamed, or misled the fact-finder so as to prompt the jury to convict the defendant for reasons other than the evidence introduced at trial and the law. Graves, 668 N.W.2d at 877. The pertinent factors in this determination include: (a) the severity and pervasiveness of the misconduct; (b) whether the significance of the misconduct is related to the central issue in the case; (c) the strength of the State's evidence; (d) the use of cautionary instructions or other curative measures; and (e) the extent to which the defense invited the misconduct. Id.

Here, the prosecutor's improper comments were made during rebuttal closing argument, immediately before the matter was submitted for jury consideration. The misconduct focused on whether the defendant had been away from the residence for more than five days and whether the five-business-day notification period had lapsed, the central points of contention at trial. The improper comments were not invited by the defense. Although the general jury instruction stating that argument is not evidence was submitted to the

jury, (Jury Instruction 8)(App.20), no specific curative measures were taken in response to the improper statements.

Additionally, the State's case was not overwhelming. The State could not say when precisely Coleman left the residence. See (Trial p.283 L.7-15). Michael Coleman testified that, although he did not see Defendant after returning to town, that was not unusual as he did not keep close tabs on the adult children living in his home, their schedules often crossed, and he would sometimes go three days without seeing Defendant. (Trial p.161 L.17-p.162 L.6, p.169 L.25-p.172 L.11, p.160 L.11-13, p. 171 L.24-p.172 L.1). The prosecutor's opening argument emphasized that Defendant did not have a key to the house and would have to be let in, meaning that he could not have entered the house without Michael Coleman's knowledge. (Trial p122 L.9-12). However, the defense subsequently established that Defendant did have a key and, therefore, could have accessed the home without his father's direct knowledge, so as to vitiate the State's claim of a continuous absence from the residence for more than five

days. (Trial p.292 L.14-p.298 L.18). All of Coleman's belongings remained in the residence, and no personal belongings (not so much as an overnight bag) were located at the Motel 6 where he was arrested. (Trial p.169 L.4-11, p.174 L.25-p.175 L.10, p.238 L.12-18, p.239 L.4-6, p.274 L.9-25, p.277 L.23-p.278 L.15). Although Coleman acknowledged to police that he had disappeared from monitoring (which would be a violation of his probation, a matter for which he was arrested), he was not asked and did not specify the start date of his disappearance or otherwise admit to having been absent from the residence for a continuous period of more than five days. (Trial p.232 L.11-23, p.235 L.11-p.236 L.8, p.249 L.8-24, p.273 L.2-10, p.283 L.7-15). As emphasized by defense counsel below, Defendant's act of leaving the residence (or even the city) or of not complying with probation monitoring would not establish a registry violation absent proof that he was absent from the residence for a continuous period of more than five days.

D. Conclusion: Defendant-Appellant James Michael Coleman respectfully requests that this Court reverse his conviction and judgment and remand for a new trial.

V. WHETHER DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO CHALLENGE COLEMAN'S SECOND OFFENSE AND HABITUAL OFFENDER STIPULATIONS ON GROUND THAT THE RECORD DID NOT ESTABLISH HE HAD COUNSEL ON THE PRIOR CONVICTIONS?

A. Preservation of Error: Ineffective-assistance-of-counsel claims are not bound by traditional rules of error preservation. State v. Ondayog, 722 N.W.2d 778, 784 (Iowa 2006).

B. Standard of Review: Review of ineffective-assistance-of-counsel claims is de novo. State v. Clay, 824 N.W.2d 488, 494 (Iowa 2012).

To establish his claim of ineffective assistance of counsel, Straw must demonstrate (1) his trial counsel failed to perform an essential duty, and (2) this failure resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674, 693 (1984); State v. Gaskins, 866 N.W.2d 1, 5 (Iowa 2015).

C. Discussion: In the present case, the district court accepted Coleman's stipulations to the Second Offense and Habitual Offender enhancements, concluding that they were voluntarily entered and were supported by a factual basis. (3/21/16 Tr. p.2 L.11-24, p.10 L.25-p.11 L.5). See also Iowa Code §§ 692A.111(1), 902.8, and 902.9(c) (2015). Trial counsel rendered ineffective assistance in failing to challenge Coleman's stipulations to the enhancements on ground that the factual record did not establish Coleman had counsel or validly waived counsel on the prior convictions. The stipulations were thus unsupported by a factual basis.

Where a defendant is alleged to be subject to enhanced punishment based on prior offenses, the "State must… establish that the defendant was either represented by counsel when previously convicted or knowingly waived counsel." State v. Kukowski, 704 N.W.2d 687, 693 (Iowa 2005). See also Iowa R. Crim. P. 2.19(9). Absent a valid stipulation to the enhancement, the State is required to prove the elements of the enhancement (including the existence of counsel or waiver

of counsel on the priors) beyond a reasonable at a second-phase trial on the enhancement. Kukowski, 704 N.W.2d at 691.

Pursuant to Iowa Rule of Criminal Procedure 2.19(9), the enhancement court must provide an offender the opportunity to affirm or deny in open court the elements of the enhancement the State would otherwise have to prove at the second trial – including the presence or waiver of counsel on the prior offenses. Iowa R. Crim. P. 2.19(9); Kukowski, 704 N.W.2d at 692. Additionally, where a defendant seeks to stipulate to prior offenses for purposes of enhancement under Iowa Rule of Criminal Procedure 2.19(9), "[t]he court has a duty to conduct a further inquiry, similar to the colloquy required under rule 2.8(2), prior to sentencing to ensure that the affirmation is voluntary and intelligent." Kukowski, 704 N.W.2d at 692. This is because, although Rule 2.8(2)(b) governing guilty pleas does not expressly apply to enhancements, a "defendant's admission of prior… convictions which provide the predicate for sentencing [enhancements] is

so closely analogous to a plea of guilty that it is appropriate to refer to our rules governing guilty pleas…." State v. Brady, 442 N.W.2d 57, 58 (Iowa 1989). See also State v. Vesey, 482 N.W.2d 165, 168 (Iowa Ct. App. 1991). "[T]rial courts have a duty to ensure that defendants knowingly and voluntarily stipulate to having prior convictions," State v. McBride, 625 N.W.2d 372, 374-75 (Iowa Ct. App. 2001), and Iowa "Rule [of Criminal Procedure] 2.8(2)(b) codifies [the] due process mandate" courts must follow in accepting admissions of guilt, State v. Loye, 670 N.W.2d 141, 151 (Iowa 2003). One of the elements required for a valid admission of guilt under Rule 2.8(2)(b) is that a factual basis exist therefor. Iowa R. Crim. P. 2.8(2)(b).

In the present case, the record of stipulation did not establish that Coleman's prior convictions qualified under Iowa Rule of Criminal Procedure 2.19(9) because nothing in the record established that Coleman had been represented by counsel or validly waived the right to counsel in connection with the prior convictions. The court did not ask Coleman if

the offender was represented by counsel or waived counsel on the prior conviction, as required under Rule 2.19(9)(requiring that the affirmance or denial be made "in open court"). See Iowa R. Crim. P. 2.19(9). Nor did the broader record before the court at the time of the stipulations establish that Coleman had counsel or waived counsel on the prior offenses. Cf. State v. Rodriguez, 804 N.W.2d 844, 849 (Iowa 2011)(the factual basis for a guilty plea must be disclosed in the record); Rhoades v. State, 848 N.W.2d 22, 29 (Iowa 2014)("At the time of the guilty plea, the record must disclose facts to satisfy all elements of the offense."). Neither the trial information nor the minutes of testimony included any allegation that Coleman either had counsel or had waived counsel on the prior offenses. (10/5/15 TI; 10/5/15 Supplemental TI; 2/22/16 Amended TI; 3/7/16 Amended TI)(App.5-10); (10/5/15 Minutes; 2/22/16 Additional Minutes)(Confid.App.4-21). This case is therefore distinguishable from State v. Bumpus, 459 N.W.2d 619, 626 (Iowa 1990) and Vesey, 482 N.W.2d at 168, where there was no finding of prejudice when the minutes

affirmatively showed the defendant was represented by counsel on the prior convictions.

Defense counsel was ineffective for failing to file a motion in arrest of judgment or to otherwise challenge the defective stipulation where the record failed to establish the prior convictions qualified for enhancement purposes under Rule 2.19(9). Because a defendant's admission of prior convictions for purposes of a sentencing enhancement "is so closely analogous to a plea of guilty," Brady, 442 N.W.2d at 58, the rationale of the cases addressing ineffective-assistance-of-counsel claims arising out a guilty plea that lacks a factual basis should be applied here. See State v. Philo, 697 N.W.2d 481, 484–85 (Iowa 2005)(holding defense counsel violates an essential duty when counsel permits the defendant to plead guilty and waive his right to file a motion in arrest of judgment when there is no factual basis to support the defendant's guilty plea); State v. Hack, 545 N.W.2d at 262, 263 (Iowa 1996)(stating that endorsing a trial strategy which allows a client to plead guilty notwithstanding the lack of factual basis

erodes the integrity of all pleas and the public confidences in the criminal justice system). In the context of ineffective assistance of counsel stemming from a guilty plea that is unsupported by factual basis, prejudice is "inherent." See State v. Schminkey, 597 N.W.2d 785, 788 (Iowa 1999). Similarly, an inherent prejudice rule should be applied where, as here, the record does not establish that the defendant's prior conviction could be used to enhance the defendant's current offense under Rule 2.19(9).

Coleman's conviction and sentence should be vacated, and his case remanded for further stipulation proceedings pursuant to Rule 2.19(9) and 2.8(2)(b) or a trial on the sentencing enhancement. Cf. State v. Mitchell, 650 N.W.2d 619, 621 (Iowa 2002)(per curiam)(stating that if it is possible that a factual basis could be shown for the defendant's guilty plea, the appropriate remedy is to vacate the sentence and remand for further proceedings to give the State an opportunity to establish a factual basis).

D. Conclusion: Coleman respectfully requests that his conviction and sentence be vacated and his case be remanded for further stipulation proceedings pursuant to Rules 2.19(9) and 2.8(2)(b) or a trial on the sentencing enhancement.

VI. THE DISTRICT COURT ERRED IN ORDERING THAT APPELLATE ATTORNEY FEES WOULD BE ASSESSED IN THEIR ENTIRETY UNLESS COLEMAN FILED A REQUEST FOR A HEARING ON THE ISSUE OF HIS REASONABLE ABILITY TO PAY.

A. Preservation of Error: Appeals of restitution orders are reviewed for an abuse of discretion. State v. Van Hoff, 415 N.W.2d 647, 648 (Iowa 1987). Constitutional issues are reviewed de novo. State v. Dudley, 766 N.W.2d 606, 626 (Iowa 2009).

B. Standard of Review: Review of sentencing is properly before this court upon direct appeal despite the absence of objection in the trial court. State v. Cooley, 587 N.W.2d 752, 754 (Iowa 1999).

C. Discussion: The sentencing court determined that Coleman did not have the ability to reimburse the state for court-appointed attorney fees incurred in connection with

district court proceedings. (Sent. Tr. p.20 L.23-p.21 L.18); (4/29/16 Judgment and Sentence, p.2)(App.27). The district court also recognized Coleman's continued indigence in further appointing appellate counsel to represent him on appeal and in ordering preparation of transcripts at public expense. (5/27/16 Order for Appellate Counsel and Transcripts at State Expense)(App.32). Nevertheless, the court's sentencing order contained the following paragraph regarding assessment of *appellate* attorney fees:

> […] The Defendant is advised that if he/she qualifies for court appointed appellate counsel then he/she can be assessed the cost of the court appointed appellate attorney when a claim for such fees is presented to the clerk of court following the appeal. The Defendant is further advised that he/she may request a hearing on his/her reasonable ability to pay court appointed appellate attorney fees within 30 days of the issuance of the procedendo following the appeal. *If the Defendant does not file a request for a hearing on the issue of his/her reasonable ability to pay court appointed appellate attorney fees, the fees approved by the State Public Defender will be assessed in full to the Defendant.*

(4/29/16 Judgment and Sentence, p.3)(App.28)(emphasis added).

Restitution for court-appointed attorney fees may only be assessed to the extent the defendant is reasonably able to pay. Iowa Code §§ 910.2(1) (2015)(The "sentencing court shall order that restitution be made by each offender… to the clerk of court… to the extent that the offender is reasonably able to pay, for… court-appointed attorney fees ordered pursuant to section 815.9…."); 815.14 (2015)("The expense of the public defender required to be reimbursed is subject to a determination of the extent to which the person is reasonably able to pay, as provided for in section 815.9 and chapter 910."). "A defendant's reasonable ability to pay is a constitutional prerequisite for a criminal restitution order such as that provided by Iowa Code chapter 910." Van Hoff, 415 N.W.2d at 648. Thus, before ordering payment for court-appointed attorney fees and court costs, the court must consider the defendant's ability to pay. The imposition of a reimbursement obligation "without any consideration of… ability to pay infringes on [the defendant's] right to counsel." Dudley, 766 N.W.2d at 626.

The last paragraph of the district court's sentencing order, however, appears to contemplate that unless Coleman affirmatively requests a hearing challenging his ability to pay, the full amount of appellate attorney fees will simply be imposed by the district court following the conclusion of the appeal. (4/29/16 Judgment and Sentence, p.3)(App.28)("If the Defendant does not file a request for a hearing on the issue of his/her reasonable ability to pay court appointed appellate attorney fees, the fees approved by the State Public Defender *will* be assessed in full to the Defendant.")(emphasis added). Such aspect of the sentence is unauthorized and illegal. It also amounts to a "failure of the court to exercise discretion or an abuse of that discretion." Van Hoff, 415 N.W.2d at 648. Statutorily and constitutionally, the court must consider the defendant's ability to pay before ordering payment for court-appointed attorney fees. Id. It is error for the district court to shift the burden for raising the issue of the ability to pay to the defendant, by providing that the full amount will be assessed unless ability to pay is affirmatively challenged by the

defendant. Rather, the court is obligated to affirmatively make an ability to pay determination before ordering payment for court-appointed attorney fees. See Dudley, 766 N.W.2d at 615 (reimbursement obligation "may not be constitutionally imposed on a defendant unless a determination is *first* made that the defendant is or will be reasonably able to pay the judgment.") (emphasis added); Goodrich v. State, 608 N.W.2d 774, 776 (Iowa 2000)("Constitutionally, a court must determine a criminal defendant's ability to pay *before* entering an order requiring such defendant to pay criminal restitution pursuant to Iowa Code section 910.2.")(emphasis added).

D. Conclusion: The portion of Coleman's sentence relating to the obligation to pay appellate attorney fees absent a request for hearing on reasonable ability to pay should be vacated, and this matter should be remanded to the district court for entry of an amended sentencing order omitting the offending language. See (4/29/16 Judgment and Sentence, p.3)(App.28)("If the Defendant does not file a request for a hearing on the issue of his/her reasonable ability to pay court

appointed appellate attorney fees, the fees approved by the State Public Defender will be assessed in full to the Defendant.").

REQUEST FOR ORAL ARGUMENT

Counsel requests to be heard in oral argument if this Court believes oral argument may be of assistance to the Court.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $ 0 , and that amount has been paid in full by the Office of the Appellate Defender.

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR BRIEFS

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because:

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/s/ Vidhya K. Reddy Dated: *6/20/17*

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